STATE OF MICHIGAN

COURT OF APPEALS

RICHARD A. BOELSTLER,

Plaintiff-Appellee,

v

KATHRYN J. BOELSTLER a/k/a KATHRYN J. BARC,

Defendant-Appellant.

UNPUBLISHED
August 16, 2002

No. 237693
Oakland Circuit Court
LC No. 97-545361-DM

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant Kathryn J. Boelstler, a/k/a Kathryn J. Barc, appeals as of right from the trial court's order granting plaintiff Richard A. Boelstler's motion to change physical custody of the parties' daughter, Alyssa. We affirm.

The parties divorced in July 1998. Defendant was awarded sole physical custody of their children, Alyssa and Ryan, and moved with them to a house in Warren. Plaintiff married Cynthia Boelstler and moved to a house in Lake Orion. When Alyssa showed plaintiff and his wife large bruises on her body and told them that defendant was striking her with a belt, plaintiff moved to change custody of Alyssa. The trial court granted plaintiff extended parenting time with Alyssa pending an evidentiary hearing. After the evidentiary hearing, the trial court entered an order awarding plaintiff physical custody of Alyssa Monday through Friday, and awarding defendant parenting time throughout each weekend.

Three standards of review are used in custody cases. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). When reviewing a child custody dispute, a decision of the trial court must be affirmed unless its factual findings are against the great weight of the evidence, its discretionary rulings demonstrate a palpable abuse of discretion, or it has made a clear legal error with regard to a major issue. MCL 722.28; *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999). Furthermore, a trial court's evidentiary rulings are reviewed for an abuse of discretion. *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997).

Defendant raises seven issues on appeal. First, defendant argues that the trial court erred in admitting into evidence a psychological evaluation written by Karen Touchstone, M.A., an expert in the area of psychological evaluation and testing. Specifically, defendant claimed the

evaluation is hearsay and not admissible. We agree that the trial court abused its discretion in admitting the psychological evaluation, but we hold that the trial court's error harmless. A Friend of the Court (FOC) report "is not admissible as evidence unless both parties agree to admit it in evidence." *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). Although the trial court may consider an FOC report in making its decisions, it must reach its own conclusions on properly received evidence. *Truitt v Truitt*, 172 Mich App 38, 42-43; 431 NW2d 454 (1988). The trial court's custody decision must be based upon its own evidentiary hearing, rather than the FOC's hearing and conclusions. *Id.* at 43. Even reports that are similar to FOC reports are also inadmissible hearsay and cannot be admitted as evidence without the consent of both parties. See, e.g., *Shelters v Shelters*, 115 Mich App 63, 68; 320 NW2d 292 (1982) (FOC and social service agency reports); *Adams v Adams*, 100 Mich App 1, 15; 298 NW2d 871 (1980) (foreign state conciliation service report was inadmissible hearsay because it was "akin to a report from a Michigan friend of the court office . . . ").

The psychological evaluation in the instant case was a report written by Touchstone, a psychologist who worked for the Oakland County Court Psychological Clinic. In the psychological evaluation, Touchstone discussed her interviews with the parties and their children, discussed the children's test results, and discussed the child custody factors. In these ways, the evaluation was similar to an FOC report. Therefore, the trial court erred in admitting the psychological evaluation because it was inadmissible hearsay.[1] *Truitt*, *supra*; *Shelters*, *supra*.

Consequently, the issue is whether the trial court's error requires reversal of the order granting plaintiff's motion for change of custody. In a custody case, "upon a finding of error an appellate court should remand the case for reevaluation, unless the error was harmless." *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994), after remand 229 Mich App 19; 581 NW2d 11 (1998). We consider this case unlike *Truitt*, *supra* at 44, where this Court remanded a custody case when the trial court improperly reviewed and adopted the FOC findings instead of arriving at its own conclusions. That trial court improperly made factual findings that were not supported by the testimony at its own hearing, but were evidently supported by the FOC investigation and hearing. In contrast, the record in the instant case shows that the trial court made its own findings, rather than relying solely on Touchstone's findings in her psychological evaluation. In fact, the trial court ultimately found in favor of plaintiff on largely different factors than Touchstone did. Because Touchstone testified to much of the same findings she made in the evaluation, the trial court could have relied on this testimony without relying on the hearsay evaluation in making its own findings. *Id.* Therefore, we hold that the trial court's admission of the psychological evaluation was harmless error. See *Fletcher*, *supra* at 889.

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[1] Because the psychological evaluation was prepared by a licensed psychologist with a master's degree, not a medical doctor, and does not contain statements made by the parties or their children for the purpose of medical treatment or diagnosis, we reject plaintiff's argument that the evaluation falls under the medical record exception to the hearsay rule. See MRE 803(4). Moreover, the evaluation does not fall under the business records exception because a psychological evaluation is not a record that is "kept in the course of a regularly conducted business activity." MRE 803(6).

For all remaining arguments on appeal, defendant contends that the trial court ignored the great weight of the evidence in granting plaintiff's motion to change custody on a variety of the child custody factors. This Court has set forth the requirements for a change of custody in a case where, as here, the parties do not dispute that an established custodial environment existed with one party:

> A custody award may be modified on a showing of proper cause or change of circumstances that establishes that the modification is in the child's best interest. . . . However, when a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest. . . . [*Phillips, supra* at 24-25 (citations omitted).]

Thus, plaintiff had the burden of showing by clear and convincing evidence that a change in custody from that of defendant was in Alyssa's best interests. *Id*. at 26. In evaluating the factors listed in MCL 722.23 to determine the best interests of the child, neither the trial court nor this Court must give equal weight to each of the custody factors. *Id*.; *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). The trial court may consider evidence that is relevant for one factor in making its finding in regard to another factor. *Fletcher (After Remand)*, *supra* at 25-26. A trial court's findings regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Phillips, supra* at 20. The trial court in this case found in favor of defendant for factors (a) and (i), found in favor of plaintiff for factors (b), (d), (h), and (k), and found that the parties were equal in regard to the other factors.

In its second argument on appeal, defendant argues that the trial court's finding that best interest factor (b) favored plaintiff was against the great weight of the evidence. We disagree. MCL 722.23(b) examines each party's capacity and disposition to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed. The trial court stated that plaintiff was "better able to provide the structure[,] boundaries and limits that Alyssa requires to develop age appropriately." It is true that defendant generally was the primary person responsible for taking care of Alyssa's education until plaintiff moved for a change in custody. The deciding criterion for the trial court involved the fact that Alyssa was diagnosed with attention deficit hyperactive disorder (ADHD), oppositional defiant disorder (ODD), and other psychological conditions. The court acknowledged that defendant facilitated various therapies for Alyssa, and provided Alyssa with religious training by taking her to Catechism and church every week.

However, there was evidence that Alyssa was much more well-behaved around plaintiff and his wife and could focus on tasks better while with them. Touchstone testified that although defendant was a caring person, defendant's and Alyssa's co-dependent personality styles and defendant's conceded inability to manage Alyssa's extreme tempter tantrums created an unstable home environment. Instead, Touchstone testified, Alyssa required structure, routine, consistency, and limits in order to function in an age-appropriate way in society, and that Alyssa's problems could become worse if she stayed with defendant. In particular, Touchstone stated, Alyssa blamed herself for defendant's difficulty with her and believed that it was her fault that defendant struck her. Considering Touchstone's expert testimony, which is similar to her

conclusions in the psychological evaluation, we are not persuaded that the trial court's findings were against the great weight of the evidence in regard to factor (b).

Third, defendant argues that the trial court's finding that the parties were equal with regard to best interest factor (c) was against the great weight of the evidence. MCL 722.23(c) examines each party's capacity and disposition to provide food, clothing, medical treatment, and other material needs. The trial court found that factor (c) favored neither party because "[b]oth parties are capable of earning a living and supplying Alyssa with her material needs." Indeed, the evidence showed that each party provided and cared for Alyssa in this way. Defendant argues that, although both parties might be capable of supplying Alyssa with her material needs, she proved that she is more disposed to do so. To the contrary, we do not agree that the great weight of the evidence shows that factor (c) favors defendant. The evidence does show that defendant may have been more involved than plaintiff in Alyssa's therapy sessions and administering Alyssa's medications. Nonetheless, while Alyssa was in plaintiff's care, plaintiff had Alyssa see a therapist and there is no evidence that plaintiff was unwilling to assist Alyssa in taking her medications. Therefore, we hold that the trial court's findings were not against the great weight of the evidence with regard to factor (c).

Fourth, defendant argues that the trial court's finding that best interest factor (d) favored plaintiff was against the great weight of the evidence. MCL 722.23(d) considers the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. The trial court found that factor (d) favored plaintiff because Alyssa had adjusted well to living with plaintiff and "[d]efendant's home environment has been unstable given Defendant's inability to manage Alyssa's acting out behaviors." While generally the evidence shows that living with defendant was somewhat pleasant for Alyssa, defendant also admitted that she had used corporal punishment with Alyssa and locked her in her room when she was having a temper tantrum.

Alyssa moved in with plaintiff and his wife after the court ordered that plaintiff's parenting time be extended, and Alyssa was at a day camp while plaintiff and his wife were at work during the summer. Alyssa's behavior was very good with plaintiff and his wife, and the day camp never complained to plaintiff or his wife that Alyssa was misbehaving. Neither plaintiff nor his wife ever used physical discipline against Alyssa; instead, the couple had firm rules for the children. Plaintiff's wife, Cindy, testified that she wants the best for Alyssa and will help her, do things with her, and listen to her if she has problems. Again, Touchstone's testimony – that plaintiff's home provided the structure Alyssa needed – prevailed for the trial court on this factor. The trial court properly found that Touchstone was qualified as an expert in the area of psychological evaluation and testing, and listened to her testimony in the form of an opinion. MRE 702. Therefore, the trial court's finding that factor (d) favored plaintiff was not against the great weight of the evidence.

Defendant's fifth argument on appeal is that the trial court's finding that best interest factor (e) favored neither party was against the great weight of the evidence. MCL 722.23(e) evaluates the permanence, as a family unit, of the existing or proposed custodial home. The trial court found in favor of neither party for factor (e) because "Defendant and Plaintiff both offer the security of a family unit and permanence to Alyssa." The evidence shows that when Alyssa lived with defendant and Ryan after the divorce, Alyssa got along well with Ryan and made friends in the neighborhood. Plaintiff lived in a house in Lake Orion with his wife, Cindy, who

testified she and Alyssa were "best friends" and "have a great time," despite being an authority figure. Plaintiff also testified that he had "a good support system of friends and relatives for Alissa's [sic] emotional well being."

We do not agree that the trial court's finding in regard to best interest factor (e) was against the great weight of the evidence. Although defendant's family unit is composed of more of Alyssa's blood relatives, plaintiff offers a strong family unit through his wife and her family. Alyssa may be able to see her brother more living with defendant, but there is no evidence that plaintiff would not encourage a relationship between Alyssa and Ryan. We are not persuaded that the great weight of the evidence demonstrates that defendant can provide a more permanent family unit or home.

Sixth, defendant argues that the trial court's finding that best interest factor (h) favored plaintiff was against the great weight of the evidence. MCL 722.23(h) considers the home, school, and community record of the child. The trial court found in favor of plaintiff for factor (h) because Alyssa acted out aggressively while in defendant's care, but was able to control her anxieties while in plaintiff's home. The trial court found that, to deal with Alyssa, defendant struck her, locked her in her room, physically restrained her, and took her to the emergency room for medication.

We reject defendant's argument that these findings are not supported by the record. The evidence shows that, while living with defendant, Alyssa had trouble focusing on school work because of her ADHD. At home, Alyssa had temper tantrums and defied defendant, and defendant handled two of the incidents by striking Alyssa with a belt and locking her in her room, leaving welts and bruises on Alyssa's body. Again, Touchstone testified that defendant had to use extreme measures to manage Alyssa, including physical discipline that left injury and taking Alyssa to the hospital to have her sedated. Further, Touchstone testified that defendant reinforced Alyssa's dependency on her by allowing Alyssa to sleep in the same bed as her. In contrast, Alyssa's behavior was very good when she was around plaintiff and his wife. Neither plaintiff nor his wife ever used physical discipline against Alyssa. Touchstone testified that being at plaintiff's home, Alyssa could properly develop the skills to overcome her anxiety and be reunited with defendant.

Defendant also argues that the trial court's statement that Touchstone and Bryant recommended that Alyssa live with plaintiff and change schools was not true. While the trial court erred because Bryant recommended that defendant have parenting time during the week, the court's opinion shows that it made an independent decision that was not based solely on Touchstone's or Bryant's recommendations. In considering the evidence presented, especially the evidence that Alyssa is more stable and focused and can be managed while in plaintiff's care, the trial court's finding that factor (h) supported plaintiff was not against the great weight of the evidence.

Defendant's seventh and final argument is that the trial court's finding that best interest factor (k) favored plaintiff was against the great weight of the evidence. MCL 722.23(k) considers domestic violence against the child or witnessed by the child. The trial court found factor (k) in favor of plaintiff because of these incidents where defendant struck Alyssa with a belt and left physical marks. Defendant admitted that there were several instances when she used corporal punishment with Alyssa. In November 2000, Alyssa was "having one of her tantrums"

when defendant locked Alyssa in her room and Alyssa began throwing things inside. Defendant also admitted spanking Alyssa, leaving red welts on her. On November 27, 2000, Alyssa showed plaintiff a welt across her back, bottom, and thigh that were made by a belt. In April 2001, Alyssa was "having a tremendous tantrum" and defendant testified that she spanked her with a belt, leaving welts on Alyssa. On April 3, 2001, Alyssa showed plaintiff a large bruise from the top of her knee to the top of her hip, and Alyssa told him that defendant had struck her several times with a belt and that she wanted the beating to stop.

Defendant argues that the trial court erred in finding in favor of plaintiff regarding this best interest factor because the incidents of corporal punishment did not constitute domestic violence. Again, we hold that the trial court's finding that factor (k) favored plaintiff was not against the great weight of the evidence. The evidence shows that defendant struck Alyssa with a belt several times and left large welts, and Touchstone testified that these incidents constituted domestic violence. Neither plaintiff nor his wife ever struck Alyssa or used physical discipline against her. Regardless of why defendant struck Alyssa, the evidence supported the trial court's conclusion that defendant's act of striking Alyssa with a belt hard enough to leave welts constituted domestic violence. Therefore, the trial court's finding that factor (k) favored plaintiff was not against the great weight of the evidence. See MCL 722.28.

Because none of the trial court's findings regarding the custody factors were against the great weight of the evidence, we are not persuaded that the trial court abused its discretion in granting plaintiff's motion to change custody.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell